

**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE NORTHERN DISTRICT OF IOWA**  
**EASTER-WATERLOO DIVISION**

CARL ELLIS WATERS,

Petitioner,

No. C01-2068-MWB

vs.

**REPORT AND RECOMMENDATION ON MOTION TO DISMISS**

TERRY MAPES, Warden,

Respondent.

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***I. INTRODUCTION***

This matter is before the court on the Respondent's Motion to Dismiss and supporting brief (Doc. Nos. 7 & 8), filed December 17, 2001. The Petitioner Carl Ellis Waters ("Waters") resisted the motion on February 4, 2002 (Doc. No. 13), and the Respondent filed a reply brief on February 19, 2002 (Doc. No. 14). On December 19, 2001, Chief Judge Mark W. Bennett referred this matter to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition. The court finds the Respondent's motion is fully submitted and ready for decision, and turns to consideration of the motion.

**II. FACTUAL AND PROCEDURAL BACKGROUND**

Waters was convicted on October 30, 1998, on two drug delivery charges. He was sentenced to 25 years on one count and 15 years on the other count, with the terms to run concurrently. (Doc. No. 2, p. 2; Doc. No. 3, p. 8; Doc. No. 8, pp. 1, 2) Waters filed a direct appeal, and his conviction was affirmed by the Iowa Court of Appeals on December 13, 1999. (Doc. No. 2, p. 3; Doc. No. 8, pp. 1, 2 & App. A) The Iowa Supreme Court denied further review of Waters's case on March 3, 2000. (Doc. No. 8, p. 2 & App. B) Procedendo issued on March 13, 2000. (*Id.*, App. C) Waters did not file an application for post-conviction relief. (Doc. No. 8, p. 1)

Waters filed a petition for writ of *habeas corpus* in this court on October 25, 2001 (Doc. No. 2)([1](#)) The Respondent argues Waters's petition is time-barred by the one-year statute of limitations contained in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified, in pertinent part, at 28 U.S.C. § 2244(d).([2](#)) Waters agrees his petition was filed beyond the one-year deadline; however, Waters argues the AEDPA's statute of limitations should be tolled in this case because his attorney failed to inform him of pertinent deadlines and procedures, and Waters's minimal access to legal resources prevented him from filing a timely petition. (Doc. No. 13, citing *Kreutzer v. Bowersox*, 231 F.3d 460,

463 (8th Cir. 2000), *cert. denied*, \_\_\_ U.S. \_\_\_, 122 S. Ct. 145 (2001))

### III. ANALYSIS

There is no question that Waters's petition was filed well over one year after his judgment became final on June 1, 2000.<sup>(3)</sup> The only question before the court, then, is whether Waters is entitled to some type of equitable tolling of the limitations period. (Doc. No. 13) "Equitable tolling can be applied to prevent the application of the AEDPA's statutory deadline when 'extraordinary circumstances' have worked to prevent an otherwise diligent petitioner from timely filing his petition. *Helton v. Sec'y for Dept. of Corrections*, 259 F.3d 1310, 1313 (11th Cir. 2001) (citation omitted). The Eighth Circuit Court of Appeals has explained:

It is settled in this circuit (and most others) that the statute of limitations in § 2244(d) is subject to the doctrine of equitable tolling. *See Gassler v. Bruton*, 255 F.3d 492, 495 (8th Cir. 2001). However, equitable tolling affords the otherwise time-barred petitioner an exceedingly narrow window of relief:

Equitable tolling is proper only when extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time. Further, equitable tolling may be appropriate when conduct of the defendant has lulled the plaintiff into inaction.

*Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000) (citations omitted), *cert. denied*, --- U.S. ---, 122 S. Ct. 145, --- L. Ed. 2d --- (2001).

*Jihad v. Hvass*, 267 F.3d 803, 805 (8th Cir. 2001). Waters claims the circumstances of this case represent the type of "extraordinary circumstances beyond a prisoner's control" that warrant equitable tolling.

Waters first argues "[t]he opinion of the Court of Appeals left some ambiguity for Mr. Waters as to whether Mr. Waters should pursue State Post Conviction relief." (*Id.*, p. 2) The appellate court held, "We do not preserve any claims raised by Waters for postconviction relief proceedings. Those claims for which an adequate record exists were either decided adversely to Waters on their merits or for want of prejudice under the *Strickland* analysis." (Doc. No. 8, App. A, p. 20) In other words, the Court of Appeals held Waters had no basis for a postconviction relief action. Regardless of whether Waters was confused about whether or not to pursue postconviction relief, the court is at a loss to determine how that would affect his decision to file a *habeas* action in this court.

Next, Waters argues his lack of access to legal materials resulted in a delay before he discovered he had a right to federal relief. He urges the court to toll the AEDPA statute of limitations during the time when he lacked access to legal materials that would have informed him of his rights and the applicable deadlines. Numerous federal courts have considered whether a prisoner's lack of access to legal materials warrants equitable tolling, and have rejected the argument. *See, e.g., Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000) (inmate proceeding *pro se* argued he missed deadline due to inadequate prison library and ignorance of the law); *Kreutzer, supra*, 231 F.3d at 463 ("Even in the case of an unrepresented prisoner alleging a lack of legal knowledge or legal resources, equitable tolling has not been warranted. *See Preston v. State of Iowa*, No. 99-3261, 221 F.3d 1343, 2000 WL 995013 at \*1 (8th

Cir. 2000) (*per curiam*); *Paige v. United States*, 171 F.3d [559,] 561 [(8th Cir. 1999)]." (Additional citations omitted.)); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998) ("It is not enough to say that the [prison] lacked all relevant statutes and case law or that the procedure to request specific materials was inadequate.").

Finally, Waters argues his appellate counsel failed to advise him of the statute of limitations, failed to explain the Court of Appeals's holding clearly, and gave him "insufficient advice . . . on the proper legal vehicle by which to assert his rights." (Doc. No. 13, p. 4) In *Kreutzer v. Bowersox*, 231 F.3d 460 (8th Cir. 2000), *cert. denied*, \_\_\_ U.S. \_\_\_, 122 S. Ct. 145 (2001), the court held:

[C]ounsel's failure to recognize the importance of the one-year statute of limitations in section 2244(d)(1) does not necessarily invoke the equitable tolling doctrine. We agree with those courts that have found that counsel's confusion about the applicable statute of limitations does not warrant equitable tolling. *See, e.g., Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000) (lawyer's innocent mistake in interpreting AEDPA's statutory provisions does not constitute extraordinary circumstances external to petitioner justifying equitable tolling); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999) (attorney's miscalculation of limitations period not a valid basis for equitable tolling). *See also Sandvik v. United States*, 177 F.3d 1269, 1272 (11th Cir. 1999) (*per curiam*) (no equitable tolling where delay was allegedly due to lawyer's decision to use regular mail, rather than expedited delivery).

*Kreutzer*, 231 F.3d at 463. *Accord Curtis v. Kemna*, No. 01-1595, 2001 WL 1480108 (8th Cir. Nov. 23, 2001) (citing *Miller, supra*; *Kreutzer, supra*).

This court finds the same reasoning is appropriate here. The alleged inadequacies of Waters's appellate counsel do not constitute the type of extraordinary circumstances that warrant equitable tolling of the AEDPA's statute of limitations.

#### IV. CONCLUSION

For the reasons set forth above, **IT IS RECOMMENDED**, unless any party files objections<sup>(4)</sup> to the Report and Recommendation in accordance with 28 U.S.C. § 636 (b)(1)(C) and Fed. R. Civ. P. 72(b) within ten (10) days of the service of a copy of this report and recommendation, that the motion to dismiss be granted, and judgment be entered in favor of the Respondent and against Waters.

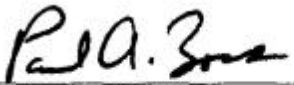
#### V. CERTIFICATE OF APPEALABILITY

A prisoner must obtain a certificate of appealability from a district or circuit judge before appealing from the denial of a federal *habeas* petition. *See* 28 U.S.C. § 2253(c). A certificate of appealability is issued only if the applicant makes a substantial showing of the denial of a constitutional right. *See Roberts v. Bowersox*, 137 F.3d 1062, 1068 (8th Cir. 1998). The court finds Waters has failed to make a substantial showing of the denial of a constitutional right, and recommends a certificate of appealability not be

issued.

**IT IS SO ORDERED.**

**DATED** this 6th day of March, 2002.

  
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PAUL A. ZOSS  
MAGISTRATE JUDGE  
UNITED STATES DISTRICT COURT

1. Waters's petition was received by the court on October 25, 2001, along with an application to proceed *in forma pauperis*. The court granted the application, and the petition was docketed on November 13, 2001.

2. (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

3. This is 90 days after the Iowa Supreme Court denied further review of Waters's direct appeal, and represents the deadline for seeking certiorari from the United States Supreme Court. Waters's conviction became final upon the expiration of that deadline. *See Nichols v. Bowersox*, 172 F.2d 1068, 1072 (8th Cir. 1999).

4. Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).